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IN THE

Supreme Court of the United States

OCTOBER TERM, 1929.

No. 85

UNITED STATES OF AMERICA,
Petitioner,

versus

MUNSON STEAMSHIP LINE,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO CERTIORARI.

FRANK LYON,
IRVING L. EVANS,
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I.

WHAT WAS DECIDED IN THE COURTS BELOW.

The question in the case was whether the Munson Steamship Line (admittedly an independent carrier by water not operated under any common management or control with any rail carrier) was nevertheless subject to the Interstate Commerce Act (U. S. C. A. Title 49, Sec. 1 [1]) and was, therefore, required on its own initiative to file with the Commission schedules of its rates and fares; by reason of the *alleged fact* that its water line (from Baltimore to Florida ports) was used under a *common arrangement* for a continuous carriage or shipment of goods by railroads to Baltimore and thence to Florida ports (R., p. 3). Respondent's answer categorically and also circumstantially denied this allegation of fact (R., pp. 10, 11).

The irreducible minimum of the Government's case was, therefore, *proof of this fact.* Both the District Court in the first instance and the Circuit Court of Appeals for the Fourth Circuit on appeal decided that the Government had failed to produce evidence to prove the fact alleged. What was decided in the lower courts was, therefore, that there was a failure of proof by the Government and the case did not turn on any unusual construction or novel application of the statute. The opinion of the District Court and Circuit Court of Appeals are officially reported respectively in 33 F. (2d) 211, and 37 F. (2d) 681.

As the case involved essentially an appreciation of the evidence, there would seem to be no sufficient reason within the rule observed to warrant certiorari.

Houston Oil Co. vs. Goodrich, 245 U. S. 440.

See also

St. L. & O'Fallon R. R. vs. U. S., 279 U. S. 461, 483.

The present contention of the Government in seeking certiorari goes no further with reference to the effect of the facts of the case than to contend that there was sufficient evidence to *support* a finding that there was a "common arrangement," or as elsewhere expressed, that under the facts it was possible to *infer* the arrangement. It is to be noted, however, from the Record that, while the Government's case consisted merely of the introduction of various transportation papers from which it sought to support an inference as to a common arrangement, the respondent by full, affirmative and detailed testimony showed definitely and positively what its business customs and practice were, thus leaving no reason-

able ground for any inference as to the ultimate facts and affirmatively showing by both documentary and oral testimony of responsible executives that there was in fact no arrangement of any kind, express or implied, between the respondent as a water carrier and the railroads for a continuous shipment. As the testimony is clear and positive, and not ambiguous or uncertain, there is no need for speculation or inference in the light of positive proof.

The facts regarding the transportation practice as found by both courts successively are stated succinctly and comprehensively by the Circuit Court of Appeals (R., pp. 194-196). It would unduly prolong this brief to repeat here the facts so found but as showing the complete independence of water carriage by the respondent we call particular attention to the following uncontradicted proof:

1. There was no through bill of lading in any form.
2. There was no single or joint rate but two separate rates independently fixed by the rail and water carriers respectively.
3. There was no agreement between the carriers either express or implied.
4. There was no basis of division of a single rate.
5. There was in every case a separate marine bill of lading issued by respondent to its shipper.
6. And in every case the *destination* in the rail bill of lading was Baltimore, and the rail carriage and the responsibility of the rail carrier in any relation to the shipment was terminated at Baltimore and the water carrier never transported the goods ex-

cept after receipt of specific instructions for carriage from the shipper.

7. And in any case the shipper was at liberty to vary or change his original intention as indicated by memorandum on the rail bill of lading (to which the respondent was in no way a party). The fact is clear and uncontradicted that this notation (in the descriptive portion of the rail bill of lading) was put there for the convenience of the rail carrier to determine at which of its several piers delivery is to be made in Baltimore (R., 68, 196, 201).

8. The receipt of the goods in Baltimore by the respondent was as agent for and subject to the instructions of the shipper and not by arrangement with the rail carrier for further continuous shipment.

We emphasize, therefore, that what was decided below was that the Government had failed to prove any arrangement of any kind between the two carriers, and that this was the controlling point in the case, and not any new construction or application of the statute involved.

II.

NO SUFFICIENT REASON FOR GRANTING CERTIORARI.

(a) *The Case Was Decided On Its Particular Facts.*

As the case turned upon the failure of proof in this case rather than upon some particular construction of the statute of general application, there would seem to be no considerations of public importance to warrant certiorari. It is to be noted that the Government proceeded under Section 20 (9) of the Interstate Commerce Act, asking for a mandamus. The case was tried to a

jury. The Government's contention is that the facts would have supported a finding of the existence of the common arrangement *if the jury had so found.* The Government's brief does not maintain that the jury must have so found or could only reasonably have so found under the facts. It is submitted that the finding of a particular jury on the particular facts of this particular case one way or the other would not be a controlling precedent nor would it establish a general principle applicable to other cases differing substantially or even slightly in their particular facts.

(b) *The Commission Passed No Order in the Case.*

Furthermore, it is to be noted that the Commission itself *passed no order in this case* against the respondent. The Government's petition recites that the proceeding is brought at the request of the Interstate Commerce Commission. Nevertheless, the Commission has not itself passed any order against the respondent. It is not surprising that the Commission has pased no order against the respondent in this matter because to have done so would seemingly have been quite inconsistent with uniform prior decisions of the Commission applicable to its own jurisdiction over water carriers engaged in merely "port to port" business as in this case. See *Luckenbach SS. Co. Inc. vs. Southern Ry. Co.,* 157 I. C. C. 752 (decided by the Commission since the institution of this proceeding). And for prior decisions of the Commission denying its jurisdiction in cases of similar water transportation see also—

Corona Coal Co. vs. Secretary of War, 69 I. C. C. 389.

Transcontinental Commodity Rates, 32 I. C. C. 449.

Wool Rates Investigation, 1923, 91 I. C. C. 235, 275.
Rail and Water Rates, 63 I. C. C. 267.
In the Matter of Jurisdiction over Water Carriers, 15 I. C. C. 205.

A very recent opinion by Examiner Hurley of the Interstate Commerce Commission in the case of *Baltimore Association of Commerce vs. American Hawaiian SS. Co.,* No. 20306 I. C. C., is, as shown in the opinion of the Circuit Court of Appeals, interesting in its application by the Examiner of his understanding of the Commission's jurisdiction over transportation by water carriers under almost precisely similar circumstances to those in this case. From these decisions of the Commission it would seem entirely clear that the Commission has decided time and again that under the statute it has no jurisdiction over a water carrier with respect to the kind of transportation here involved *under the Interstate Commerce Act.*

The lack of jurisdiction by the Interstate Commerce Commission over independent water carriers does not, however, mean that they are not subject to public supervision because by the express Act of Congress even independent water carriers are subject to the United States Shipping Board and are required to file schedules of maximum rates with that Board (46 U. S. C. A. 817). This respondent has fully complied with that Act.

(c) *But the Commission Could Have Passed an Order Under the Panama Canal Act.*

Furthermore, while we contend it is quite clear that the respondent is not obligated on its own initiative to file its schedule of rates with the Interstate Commerce Com-

mission under Section 6 of the Act, nevertheless, a later Act of Congress known as the Panama Canal Act of 1912 (Section 6, paragraph 13 of the Transportation Act, U. S. C. A. Title 49) does apparently authorize the Commission, by order, after notice and hearing, on its own initiative, to establish through routes and maximum joint rates over rail and water lines. As to this, the Circuit Court of Appeals noted (37 Fed. (2) 683):

> "It is true that under the Panama Canal Act of August 24, 1912 (37 Stats. 560, 568, 49 U. S. C. A. 6 [13]) the Commission is given jurisdiction to establish through routes and maximum joint rates over rail and water lines, *United States vs. N. Y. Cent. RR.*, 272 U. S. 457; *Chicago, R. I. & P. Ry. vs. United States*, 274 U. S. 29; but it has not here attempted to exercise the power conferred by that Act and we may accordingly dismiss it from consideration."

We see, therefore, that if the facts justify it and the public interest demands it the Commission now has power to take the initiative in this matter and pass such orders with respect to through routes and maximum rates to be observed by rail and water carriers as the public interest may demand. *And as the Commission has not in its discretion deemed it wise or in the public interest to establish such through routes,* there would seem to be no public interest deeply involved in requiring the water carriers to themselves take the initiative in making arrangements with rail carriers for through routes and filing rates therefor. *And there would seem also to be no such public or general interest as would warrant certiorari in this case to review the decision on the facts by two successive courts to the effect that this respondent has in fact not made any common arrangement with the rail carrier for such through route.*

III.

THE JUDGMENT SOUGHT TO BE REVIEWED WAS PLAINLY CORRECT.

(a) *The Circuit Court of Appeals properly held Baer Bros. vs. Denver & Rio Grande R. R., 233 U. S. 479, Inapplicable.*

As a reason for granting certiorari, the Government contends that the Circuit Court of Appeals failed to give proper consideration to the decision of this Court in *Baer Bros. vs. Denver & Rio Grande R. R.*, 233 U. S. 479. That case, and others relied on below by the Government, were considered and properly held inapplicable. In all thoses cases the question was whether a shipment was *interstate or intrastate*, not whether an interstate shipment was made under a "common arrangement" [R. 203, 205. 37 F (2d) 687]. When (as in the *Baer* case and others cited) only rail carriers are involved, since the Hepburn Act (1906) a "common arrangement" is immaterial.

Assuming (for sake of argument only) that the facts incidentally called a "common arrangement" in the *Baer* case would constitute a "common arrangement" within the issue in the instant case, it is sufficient that in the instant case (as both courts below have found) the facts so characterized in the *Baer* case are lacking. The *Baer* case involved carload shipments from St. Louis, Missouri, to Leadville, Colorado, by the Missouri Pacific to Pueblo, Colorado, and by the Denver & Rio Grande from Pueblo to Leadville. The Missouri Pacific acknowledged receipt of the shipments "to be delivered to the Baer Bros. Company at Leadville, Colorado, via the Denver &

Rio Grande." No through bill of lading was issued. Each shipment was waybilled to Pueblo. The car was then delivered to the Rio Grande with an expense bill disclosing the charges paid by or due to the Missouri Pacific, and was forwarded to Leadville by the Denver & Rio Grande, which named the Missouri Pacific as consignor. "Whether collected in advance at St. Louis or at destination in Leadville, *the freight was always divided between the two companies* according to their local rates * * *." (Italics supplied.) [233 U. S. 480.] On these facts this Court said:

> "That there was a common arrangement between the two carriers here was shown by the long-continued course in dealing, and *the division of the freight, with the knowledge that it had been paid as compensation for the single haul.*" (Italics supplied.) [233 U. S. 491.]

In the instant case "there is *no* agreement between defendant and the rail carriers for the division of the aggregate of the separate rail and water rates, or any *customary or conventional division thereof.* * * * Defendant receives the freight at Baltimore as agent of shipper and pays the rail charges. It then issues a bill of lading to the shipper covering the water transportation. Upon delivery in Florida, it collects from the consignee its own charges as well as the rail charges which it has advanced; but the latter are collected, not as agent for, or under any agreement with, the rail carrier, but because they have been advanced as an incident to the contract between defendant and the shipper." (Italics supplied.) [R. 194, 37 F (2d) 681-682.]

In a word, this Court in the *Baer* case said that certain specific facts showed a "common arrangement"; in the instant case *those* facts are lacking, and both courts be-

low hold that *different* facts do *not* show a "common arrangement." Certiorari would not furnish this Court opportunity to correct a misapplication of the *Baer* case, but only to review and reappraise all the facts, as to which the Interstate Commerce Commission has not seen fit to exercise its own jurisdiction and express its "informed judgment," but which have been appraised by the concurrent judgments of both courts below,—judgments in accord with the Commission's decisions on very similar facts.

(b). *Both Courts Properly Construed and Applied the Statute.*

The meaning of "common arrangement" as used in the statute is not ambiguous or uncertain. It plainly means an arrangement *between the rail and water carriers.* Equally plainly it would *not* be gratified by an arrangement only between the *shipper and either carrier.* The language of the Interstate Commerce Act, section 1, paragraph 1 is as follows:

> "That the provisions of this Act shall apply to common carriers engaged in—
>
> (a) the transportation of passengers or property wholly by railroad or partly by railroad and partly by water *when both are used* under a *common* control, management, or arrangement for a continuous carriage or shipment;" (our italics).

The context and the phraseology and the subject matter obviously import an arrangement between the carriers whereby for the purposes of the particular transportation *both are used* under a common arrangement for a continuous carriage or shipment. That is to say, *pro hac vice,* both must be used as one for a common enterprise.

It seems unnecesary in a case so plain on the facts as this one to explore very deeply the history and economic and public reasons for the passage of the act in this form. The opinion of the Circuit Court of Appeals, however, does, we submit, correctly state the controlling public considerations for the inclusion of water carriers at all within the scope of the Act. The inclusion of water carriers was incidental only to the much fuller control over rail carriers. The contemporaneous reasons for this were succinctly stated by Chairman Knapp of the Interstate Commerce Commission (later a United States Circuit Judge assigned to the Fourth Circuit) in the Commission case entitled *In the Matter of Jurisdiction over Water Carriers,* 15 I. C. C. at 207. See quotation from that Commission case in the opinion of the Circuit Court of Appeals R., p. 197, 37 Fed. (2) 683). The section in practically the same phraseology (for water carriers) has been in force for over forty years and its purpose and meaning has been commonly understood and uniformly expressed in many judicial decisions both federal and state and by text writers of note and standing writing on the subject. For instance, see *Roberts on Federal Liabilities of Carriers,* (2d Ed. 1929) sections 114, 116; *Moore on Interstate Commerce,* Sec. 45, Rail and Water Traffic; *Barnes on Interstate Transportation,* 2nd Ed. Secs. 48, 57; *Drinker on Interstate Commerce Act,* Sec. 42, Rail and Water Traffic.

The Government's petition for certiorari, page 6, states that this Court has never passed upon the question of whether the "common arrangement" of the statute applies to facts therein stated to be the facts of this case. We cannot assent to the entire correctness of the facts as there stated and would refer to the facts as stated by

the Circuit Court of Appeals (R., pp. 194 to 196, 37 Fed. (2) 681-3). Particularly we dispute the alleged fact (which incidentally is several times repeated in the Government's petition and brief) that the transportation practice here involved "requires no intervention by the shipper from the time the goods are delivered to the initial carrier until delivery by connecting water carrier at ultimate destination." The facts found by the two courts in succession expressly include the fact that the goods when delivered in Baltimore are forwarded by the respondent only pursuant, in every ase, to express and specific instructions from the shipper separately given to the *respondent by the shipper*.

Nor do we assent to the statement of the facts made in the Government's petition (page 6) in relation to the alleged cooperation of the initial carrier with the respondent. The facts of the case plainly show that the notations in the rail carrier's bill of lading are made at the instance of the rail carrier *for its own convenience in making delivery in Baltimore*. Nor does the statement of the case as made in the Government's petition include the important fact that movement over the lines of the water carrier is in every case governed entirely and completely by its *own bill of lading* separately issued to the shipper by the respondent.

That this Court has not heretofore had before it a case involving the particular facts of the instant case is unimportant as a reason for certiorari, especially since the principles governing the application of the statute to the facts of other cases have been heretofore passed upon both by this Court and frequently by the inferior federal courts. The construction and application of the statute, as made by the lower courts in the instant case is not inconsistent with or different from the effect of former de-

cisions of this court and other federal courts. Particularly the decision in this case is in nowise inconsistent with but entirely in conformity to the principles announced in *C. N. O. and T. P. Ry. vs. Interstate Commerce Commission*, 162 U. S. 184, 192, 193, the Social Circle case. See also other federal cases, including cases in this court, considered by the Circuit Court of Appeals (R., p. 200, 37 F. (2) 685) from which the conclusion drawn by the Court is correctly stated as follows:

> "And we think that no case can be found holding that a common arrangement existed within the meaning of the Act where there was no such 'continuous line' created either by through billing or conventional division of rates."

While, as said by this Court in the Social Circle case, it may be that a common arrangement could be shown from the existence of other facts, yet as a practical matter it seems no such other case has ever arisen—as might be expected from the consideration that unless there is a through billing (with its obvious advantages to the shipper) or a conventional division of rates by the carriers, there is no business incentive to the carriers to make a common arrangement for a continuous shipment.

It is not entirely clear to us what other or different definition or meaning the Government's brief contends for with respect to the phrase "common arrangement" as a matter of principle or of general application. The most concrete expression of the Government's contention for a different construction or application of "common arrangement" than was given by the lower court (consistently with numerous prior federal decisions), would seem to be at the bottom of page 18 in which it is said:

> "The successive receipt and forwarding of freight in interstate commerce by two or more connecting carriers under any arrangement by which they mutually facilitate continuous shipments over their lines in the same way as freight is transported on through bills of lading is, it is believed, evidence of a common arrangement within the meaning of the statute."

If this is intended to be formulated as a definition of the "common arrangement" of the statute it is obviously much too broad and goes far beyond the obvious context of the statute and the principles of adjudicated cases. As applied to the instant case, even if the situation as put should be *some* evidence of a common arrangement, it is not such controlling evidence as would overcome the full and affirmative evidence in this case to the contrary; and would, we submit, under all the testimony in the case, not be sufficient to support a jury finding of the existence of "common arrangement." Nor is the proposition as formulated applicable to the facts of this case, in which two successive courts have found that there was *no* arrangement between the two carriers. The *only* circumstance in this case which the Government can advance in support of the suggestion of mutual facilitation by the carriers for continuous shipments is in the notation already referred to in the rail bill of lading which, as has already been clearly pointed out in the decisions of both courts, was for the convenience of the rail carrier in making delivery. Nor would an arrangement between the carriers for their mutual convenience in making and accepting delivery of merchandise at the end of the rail carriage and the beginning of the water carriage constitute a condition under which both the rail and water carrier are used under a common arrangement for a continuous carriage which necessarily involves something that, in the way of an arrangement, management or con-

trol, is common to both carriers throughout the whole of the one journey—in other words, such a situation as necessarily exists when there is a through bill of lading or a conventional agreement for division of entire charge by separate carriers. As to this narrow issue Judge Noyes for the second Circuit Court of Appeals in *Mutual Transit Company vs. United States*, 178 Fed. 664, well said:

> "The phrase 'common arrangement' in view of its context, evidently means an agreement or understanding between connecting carriers with respect to the transportation of merchandise and the charges to be made therefor. A mere agreement by an independent water carrier to accept freight from a connecting railroad and to transport it for its own particular rate might be an 'arrangement' for continuous carriage but would not be a 'common arrangement'."

It is, we submit, too plain for further argument that under the facts in this case there was in the legal sense neither a continuous carriage nor a common arrangement by the carriers therefor. Each carriage was under a separate bill of lading. The rail carriage began at some inland point and terminated absolutely with respect to compensation and liability at Baltimore. The water carriage moved from Baltimore under a separate marine bill of lading which itself defined the compensation to be earned by the carrier and the liability for the carriage for the whole of the water journey. Instead of there being either expressly or impliedly an agreement for one continuous carriage there was clearly, as a matter of law, two separate contracts for separate stages of the transportation. The journey was not one connected chain of unbroken links even though necessarily in the physical sense two of the separate links had point of contact in Baltimore.

We, therefore, submit that this application for certiorari should be denied because—

(a) The decision was based upon the particular facts and the failure of the Government's proof rather than upon any particular construction or application of the statute, and

(b) The case was plainly rightly decided below, and

(c) No prior decisions of this Court have been misunderstood or misapplied.

There being no conflict of decisions and the case having been decided essentially on its particular facts, it would seem not to involve a question of importance requiring further litigation in the public interest.

Magnum vs. Coty, 262 U. S. 159, 163.

Respectfully submitted,

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